No. 15033

IN THE

United States Court of Appeals

For the Ninth Circuit

1956 TERM

GILBERT RIPKA and WILSON BROTHERS TRUCK LINES, INC., a corporation,

Appellants,

vs.

CHARLES CREHORE, General Administrator of the Estate of Herbert Noah Sanders and Delphia F. Sanders,

Appellee.

Appeal from the United States District Court for the District of Arizona.

BRIEF OF APPELLANTS

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STATEMENT OF JURISDICTION

At the outset a serious question of federal jurisdiction arises. While the amended complaint alleges the plaintiff, Wanek, to be a citizen of Arizona this fact is put in issue by the answer of the defendant Ripka. No proof whatever was offered as to his citizenship. Indeed, chief counsel for Mr. Wanek, Mr. Palmquist, made the startling statement in open court, (T.R. 72) "I don't even know who this Wanek is; * * *" Just how he came by his employment in the matter remains vague in the record.

Be that as it may, as to Ripka the cause must be dismissed.

McNutt vs. General Motors Acceptance Corporation, 298 U. S. 178, 80 L. ed. 1135, 56 S. Ct. 780

As to Wilson Brothers a more serious question exists. Impliedly, in its answer this defendant admits the citizenship of Wanek. But jurisdiction cannot be conferred by consent or waiver; the power to confer jurisdiction by consent of the litigants does not exist. *Nierbo Co. vs. Bethlehem Shipbuilding Co.,* 308 U. S. 165, 84 L. ed. 167, 60 S. Ct. 153. A federal court must in every case and at every stage of the proceedings satisfy itself of its own jurisdiction, which duty is imposed upon it by an act of Congress. 28 U.S.C.A. Sec. 9.

> "In cases of which the Circuit Court may take cognizance only by reason of the citizenship of the parties, this court, as its decisions indicate, has, except under special circumstances, declined to express any opinion upon the merits, on appeal or writ of error, where the record does not affirmatively show jurisdiction in the court below; this, because the courts of the Union, being courts of limited jurisdiction, the presumption is, in every stage of the cause, that it is without their jurisdiction, unless the contrary appears from the record."

Börs vs. Preston, 111 U. S. 252, 28 L. ed. 419

Mansfield etc. vs. Swan, 111 U. S. 379, 28 L. ed. 462

Treinies vs. Sunshine Mining Co., 308 U. S. 66, 84 L. ed. 85, 60 S. Ct. 44

Mr. Wanek made no appearance on the trial and when his counsel disclaimed even knowledge as to who he was it became the duty of the trial court of its own motion, to ascertain whether in fact it had jurisdiction. The citizenship of Mr. Crehore likewise, does not appear of record so the jurisdiction of both the District Court and this Court remains in doubt, and since the presumption is against jurisdiction the cases should be dismissed, plaintiff having failed to carry the burden of asserting jurisdiction at all stages of the litigation.

Without waiving (which we couldn't do anyway) the fore-

going, we turn to the jurisdictional statement, as if proof had been made of diversity of citizenship jurisdiction.

Ralph Wanek, as Administrator of the Estates of Herbert Noah Sanders and Delphia F. Sanders, deceased, brought these actions for damages to the said two estates for the alleged wrongful deaths of Herbert Noah Sanders and Delphia F. Sanders. The amended complaint set out that said plaintiff is a citizen of the State of Arizona, that defendant Ripka is a citizen of the State of Indiana, and that defendant Wilson Brothers Truck Lines, Inc. is a corporation and a citizen of the state of Missouri. The amended complaint claimed negligence by defendants in the operation of a motor vehicle proximately causing the death of these two persons. It is alleged the matter in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars. The jurisdiction of the District Court therefore under the pleadings arose under the provisions of 28 U.S.C., Sec. 1332, diversity of citizenship in a controversy involving values in excess of $3,000. (T.R. 3 et seq.)

The cause was tried upon the issues as made by the pleadings, generally alleging and denying negligence on the part of the parties. The jury returned a verdict in favor of the plaintiff administrator as to each estate and judgment was entered thereon October 10, 1955. (T.R. 33, 34) The defendants moved on October 18, 1955 for judgment notwithstanding the verdicts or in the alternative for a new trial. These motions were denied December 16, 1955. (T.R. 42) Defendants Notice of Appeal to this Court was filed December 29, 1955. (T.R. 42)

The jurisdiction of the Court of Appeals rests upon 28 U.S.C. 1291.

CONCISE STATEMENT OF THE CASE

Plaintiff, Wanek, sued as general administrator of the estates of Herbert Noah Sanders, deceased, and Delphia F. Sanders, deceased, for damages for wrongful death of each decedent claimed to have resulted from the negligence of defendant Ripka, acting as

agent of defendant Wilson Brothers Truck Lines, Inc. Such agency was admitted, negligence on the part of defendants was denied and defendants charged that plaintiff's intestates operated their motor vehicle over the center line of the highway, thereby causing their own deaths.

The accident occurred about three o'clock in the morning about seven miles west of Flagstaff, Arizona, on U. S. Highway 66. Mr. and Mrs. Sanders were killed and their three children injured in varying degrees in the collision occurring when either defendants' truck or plaintiff's Hudson automobile crossed over the center line of the highway as the vehicles were meeting, plaintiff's intestates traveling westerly and defendants in an easterly direction.

On the trial of the action at Prescott, Arizona, the jury returned a plaintiff's verdict, finding damages in the Herbert Noah Sanders' estate case in the amount of $65,000 and $18,750 in the Delphia F. Sanders' estate case. The two causes of action were sued upon in one complaint and the cases were tried as one case. Plaintiff offered on the trial in support of his allegation as to his capacity to maintain the action a certified copy of Letters of Special Administration of the two estates issued to him by the Clerk of the Superior Court of Coconino County, Arizona. Defendants objected on the grounds first, plaintiff sued as a general administrator; secondly, that a special administrator under Arizona law could not maintain such an action and thirdly, that the order of appointment, under Arizona law, is the measure of authority and there was no showing that such an order had ever been entered or that it authorized the instant actions. The objection was overruled.

The evidence as to liability was in sharp dispute, plaintiff relying entirely upon physical evidence claimed to show defendants crossed over the center line, while defendant Ripka testified unequivocally that plaintiff's vehicle as it approached suddenly crossed over the line and into his front corner.

The deceased Herbert Noah Sanders was forty-six years of age with a life expectancy of 23.83 years. He was unemployed at the time and had worked as a construction worker on roads, as a machinist and for the Naval Shipyard at Hunters Point, California.

Delphia F. Sanders was his wife, age thirty-nine years with an expectancy of 28.90 years. She had no earning history other than some casual employment as a baby sitter, at which she earned on occasions $10 to $11 per week.

The family consisted of the father and mother and three daughters, seventeen, thirteen and seven. They had been to Las Cruces, New Mexico, looking for work and were returning to California driving a 1949 Hudson pulling a two-wheel trailer loaded with household goods, etc. Mr. Sanders was driving. They had stopped at about twelve o'clock that night at a place called White Elephant Lodge where Mr. Sanders had some coffee and bought some No Doz pills. Such a box was found in the Sanders' car after the accident with only one tablet left in it.

The total accumulations of the family consisted of about $2,400 in cash carried with them, a 1949 Hudson car and two-wheel trailer, household and personal effects of the family. The plaintiff offered no evidence as to how present value or worth of a sum to be received in the future should be computed.

There are three questions presented for determination:

1. The plaintiff alleged in the amended complaint (T.R. 3 et seq.) "Plaintiff* * * is, pursuant to and under the laws of the state of Arizona, the duly appointed, qualified and acting administrator of the Estate of Herbert Noah Sanders, deceased, and of the Estate of Delphia F. Sanders, deceased." By appropriate pleadings defendants put this matter in issue. (T.R. 8, 13) Upon the trial plaintiff tendered a certified copy of letters of special administration in each estate. (T.R. 157, 158) Objection was made to the offer upon two grounds. First, the suit was alleged to be by a general administrator and hence the special letters were

inadmissable as being immaterial. Second, a special administrator has no authority or right to maintain an action for wrongful death under the laws of the state of Arizona (T.R. 157, 158) in any event without the order of Court appointing him conferring such power. The objection was overruled and the Special Letters were admitted as plaintiff's Exhibit 21 in Evidence.

At the conclusion of the plaintiff's case defendants moved to dismiss the cause or for a directed verdict because of failure of proof as to capacity to maintain the action and upon the further ground that the statutes of the state of Arizona require that the order of appointment of a special administrator shall specify what the powers of a special administrator shall be and, no proof having been offered as to any order authorizing plaintiff to bring the actions, the plaintiff had failed to sustain the burden of proof as to this vital fact. (T.R. 302 et seq.) These motions were denied and were renewed and again denied at the close of all the evidence. (T.R. 421, 422)

Subsequent to the verdicts in favor of the plaintiff, a written motion was filed to substitute Charles Crehore, general administrator of the two estates, as plaintiff and for judgment in his favor upon the verdicts. (T.R. 29 et seq.) Written objections were filed upon the grounds heretofore stated and upon the further ground that a federal district court is without probate jurisdiction and that accordingly, until the state court having jurisdiction had ordered the transfer of the causes of action and wound up the affairs of the special administrator, such order requested would be void. (T.R. 32) The objections were overruled and judgment ordered in favor of the general administrator. (T.R. 34)

By written motion for judgment notwithstanding the verdict or for a new trial, defendants again challenged the verdict and judgment for the foregoing reasons (T.R. 35) which motions were denied. (T.R. 42)

2. The plaintiff failed to offer any evidence by which the jury could determine the "present worth" or "present value" of

the probable accumulations of the decedents. This is a matter for expert testimony without which the plaintiff's case in a wrongful death case falls. This point was raised by motion at the close of plaintiff's case (T.R. 303) and at the close of all the evidence (T.R. 421, 422)

3. The verdicts and each of them, are the result of passion, prejudice or sympathy in that there was no evidence from which the jury on any conceivable theory could have found that the marital community of Mr. and Mrs. Sanders would have accumulated an amount which the present worth of $83,750 would represent, the aggregate amount of the two verdicts. Mr. Sanders was unemployed, Mrs. Sanders was a housewife with no earning power except as a baby sitter or housekeeper. The total accumulations of the community did not exceed approximately $4,000. Mr. Sanders was forty-six and Mrs. Sanders thirty-nine.

This question was raised by defendants' motion for a new trial. (T.R. 35 et seq.)

SPECIFICATIONS OF ERROR

I

The Court erred in overruling defendants' objections to the admission in evidence of plaintiff's Exhibit 21 in Evidence for the reasons:

(a) The suits were instituted by the plaintiff as a general administrator and the certified copy of Letters of Administration was of Special Letters of Administration;

(b) There was no showing as to what powers the court granted the Special Administrator in appointing him and under the laws of the state of Arizona the order of appointment confers the powers which may be enjoyed by a special administrator;

(c) Under the laws of the State of Arizona a special administrator has no authority to bring or prosecute an action for wrongful death. (T.R. 157, 158):

"The Court: You may proceed.

"Mr. Scoville: Your Honor, at this time I would like to offer a certified copy of the letters of administration of Ralph Wanek, of the estates of Herbert N. Sanders and Delphia F. Sanders, out of the Superior Court of the State of Arizona in and for the County of Coconino, certified as having been issued to Mr. Wanek on July 12, 1954; and letters of special administration in cause 2408 of that Court and attested to by the clerk of that Court on August 3, 1955, as having been and still being in full force and effect.

"Mr. Wilmer: It was not my recollection that the suit was as special administrator, Your Honor.

"Mr. Scoville: The suit simply states, I believe, he is the administrator. It doesn't designate him as being general or special. Under the laws of the State of Arizona the special has all the powers of a general.

"Mr. Wilmer: If it please the Court, we object on the ground the action is not brought by a special administrator and hence the letters or purported letters of special administration would be immaterial; secondly, on the ground the special administrator would have no jurisdiction in prosecuting this action.

"Mr. Scoville: Under the laws of Arizona a special administrator may prosecute claims and/or sue or be sued.

"Mr. Wilmer: There is a specific statute on wrongful deaths, Your Honor, that does not apply to a special administrator.

"The Court: It will be received. I will hear you on your other points in regard to it at another time.

"Mr. Wilmer: Very well."

IN THE SUPERIOR COURT

of Coconino County, State of Arizona

In the Matter of the Estates of HERBERT N. SANDERS and DELPHIA F. SANDERS, Deceased.

No. 2408

LETTERS OF SPECIAL ADMINISTRATION

State of Arizona, } ss.
County of Coconino }

In accordance with an order made by the Superior Court on the 12th day of July, A. D. 1954, Ralph Wanek is hereby appointed Special Administrator of the Estate of Herbert N. Sanders and Delphia F. Sanders, deceased.

WITNESS Mary P. Lewis, Clerk of the Superior Court of Coconino County, State of Arizona, with the Seal of said Court affixed, this 12th day of July, A. D. 1954.

(s) Mary P. Lewis
Clerk.

State of Arizona, } ss.
County of Coconino }

I do solemnly swear that I will support the Constitution of the United States, and the Constitution and Laws of the State of Arizona, and that I will faithfully perform, according to law, the duties of Special Administrator of the Estate of Herbert N. Sanders, and Delphia F. Sanders, deceased.

(s) Ralph Wanek

Subscribed and sworn to before me this 12th day of July, A. D. 1954.

(SEAL) (s) Mary P. Lewis

II

The Court erred in denying defendants' motion for a dismissal of the actions or for a directed verdict in favor of defendants made at the close of the plaintiff's case and at the close of the entire case for the reasons:

(a) Plaintiff has instituted the actions as a general administrator and the proof, Plaintiff's Exhibit 21, showed no such appointment but only his appointment as a special administrator;

(b) The only authority which a special administrator has under the laws of the state of Arizona is that expressly conferred by the order appointing him. The tendered exhibit did not set forth these powers and there was no other evidence offered or received which showed any authority to bring or maintain the actions;

(c) A special administrator under the laws of Arizona can have no capacity to bring or maintain an action for wrongful death and the court appointing such special administrator has no power to confer such right.

III

The Court erred in denying defendants' objections to the substitution of Charles Crehore, general administrator of each estate, as plaintiff for the reasons:

(a) Wanek as special administrator had no capacity to bring or maintain the actions for the reasons (1) the laws of Arizona deny such authority to a special administrator; (2) in any event, only the authority conferred in the order of appointment may be exercised and there was no showing such authority was conferred. Hence the proceedings resulting in the verdicts to which Crehore sought substitution as plaintiff were a nullity and there was nothing to which he might be substituted;

(b) If Wanek as special administrator had authority to bring and maintain the actions the jurisdiction to divest him of control thereof and to transfer such control to a general adminis-

trator resided in the state courts of Arizona and did not reside in the federal court. The order substituting Crehore for Wanek in effect amounts to the federal court exercising state court probate jurisdiction and authority.

IV

The Court erred in denying defendants' motion for judgment notwithstanding the verdict or in the alternative for a new trial for the reasons:

(a) Wanek as special administrator had no authority to bring or maintain the actions for the reasons stated in the foregoing specifications of error;

(b) The federal court had no jurisdiction to authorize the transfer of the causes of action from the special administrator to the general administrator.

V

The Court erred in refusing to grant defendants' motion for a new trial for the reason the excessiveness of the two verdicts clearly demonstrated that the jury was motivated by passion, prejudice or sympathy in reaching its verdict and hence its decision on the question of liability was vitiated as being so infected.

VI

The Court erred in denying defendants' motion for a new trial for the reason there was no evidence in the record from which the jury could have possibly computed that the present value of the probable accumulations of Herbert Noah Sanders, had he lived, was $65,000 or that the present value of the probable accumulations of Delphia F. Sanders, had she lived, was $18,750.

VII

The Court erred in denying defendants' motion for a new trial for the reason there was no expert testimony as to the method of computing the present value of a sum of money to be received in the future and, since this is a matter upon which expert testimony

must be offered and is not a matter within the knowledge of a lay person, the jury was left to speculate as to how this finding should be achieved.

SUMMARY OF ARGUMENT

Plaintiff sued as a general administrator. His proof showed his only authority was some authority as a special administrator. The laws of Arizona require that the order of appointment spell out the authority of a special administrator (14-442 A.R.S.) and no order authorizing the bringing and prosecution of these actions was produced. Despite the fact the accident occurred July 10, 1954, plaintiff was still claiming to act under his special authority in August of 1955.

The laws of Arizona limit the power of a special administrator to "collect and preserve for the executor or administrator the *personal property of the decedent,* take charge and management of, enter upon and preserve from damage, waste and injury, the real property, and *for such purposes* may commence and maintain or defend, actions and proceedings as an administrator." (14-443 A.R.S.) (emphasis supplied) (Note: all applicable statutes will be set out totidem verbis in the appendix). The statute having specified for what purposes an action may be maintained by a special administrator, neither the Arizona court nor the Federal District Court has any power or jurisdiction to enlarge that authority. Certainly a federal court cannot in effect issue an order required by Arizona law to be issued by the state court authorizing the special administrator to sue in default of such order by the state court. Under the laws of Arizona while the action for wrongful death is brought in the name of the estate the proceeds are not an asset of the estate or a part of it. Manifestly, since the cause of action for wrongful death could not arise during the life of the decedent it could not constitute personal property of the decedent. Therefore, if the foregoing language of Section 14-443 be given the broadest construction and the authority to bring actions of a special administration be read to include the collection and preservation of the personal property of the decedent

as well as to preserve the real property (which is not a legitimate extension of its language) nonetheless such authority to prosecute a wrongful death action which arises after the death of a decedent cannot be read into the statute.

The "personal representative" who may bring the action contemplated by Section 12-612 A.R.S. is plainly not a special administrator, for a special administrator is generally held to be an agency of the court, in the nature of a receiver rather than a representative of the decedent and his estate. It is for this reason he is not liable in an action by a creditor on a claim against the decedent (14-443 A.R.S.) and he is directed to account "in like manner as administrators." (14-444 A.R.S.)

In addition, since both 14-443 and 12-612 originate with the Revised Statutes of 1901, the special statute, specifying for what purposes a special administrator might sue, being a special statute delimiting the powers of a probate functionary, would control.

With respect to point 2, failure of the plaintiff to introduce expert evidence as to the present value of a sum to be received in the future, this is a subject of expert testimony upon which lay persons are not usually informed. Therefore failure to offer such proof constitutes a failure upon the part of plaintiff to carry his burden of proof.

Finally, under the laws of Arizona the measure of damages for wrongful death is the present value of the probable accumulations of the decedent. This eliminates all questions of dependency and support lost, requires that effect be given to income and like taxes, usual living costs, etc. While, necessarily, exact proof cannot be made of what this would be, there must be some basis in the evidence for the sum allowed by the jury. Since Mrs. Sanders showed no earning power at all we must conclude the jury apportioned to her as community property a part of Mr. Sanders' earnings. Necessarily too, the jury must have concluded Mrs. Sanders would have predeceased Mr. Sanders by substantially a considerable time or they would have divided the

award equally. We find then that if we take the present award of $83,750 and use only 3% interest, uncompounded, that the jury concluded Mr. Sanders, at the expiration of his 23 year life expectancy would have earned and saved and then possessed to pass on to his heirs, (giving effect to the community interest of Mrs. Sanders,) $141,514.50. If we take their *total accumulations* and assume that Mr. Sanders would *duplicate such accumulations,* not in the next twenty-three years of his life but would earn and save a like amount after living expenses and income taxes *in every year of the twenty-three remaining years of life expectancy,* we still fall almost $50,000 short of the total allowed by the jury!

Here the evidence as to liability was in sharp conflict. The few physical facts which were reasonably clear and certain indicated defendants were not liable. There was no reasonable basis for concluding the jury paid any more attention to the evidence and instructions on liability than they did to the evidence and instructions on the issue of damages and the measure thereof. The excessive verdict, without possible support in the law or evidence requires defendants, in the interest of justice, be awarded a new trial.

ARGUMENT

We recognize this Court is not going to try again the issue of liability which the jury has resolved against defendants. We feel justified, however, in briefly outlining the facts in relation thereto for the reason it is only where the issue as to liability is sharply contested that the remedy of remittitur is ineffectual. In other words, if defendants are plainly liable then the excessive verdict can be corrected by the court. However, passion, prejudice and sympathy when rampant in the minds of jurors, like a carcinoma in its final stages, are not found confined to one issue but infect the entire case as the cancerous cells poison every gland and organ of the unhappy victim's body. We believe, unless the measure of damages long recognized as the law in the state of Arizona is to be disregarded by this Court, plainly the verdicts of the jury as to the amount of damages must be found so excessive and so

at variance with plaintiff's own evidence that passion, prejudice and sympathy on the part of the jurors must be found.

We will divide our argument into two parts. The first will cover the question of the jurisdiction of the District Court to proceed with the action when it developed upon the trial that the purported plaintiff was only a special administrator and hence without capacity to maintain the action. The second part will be devoted to the question as to the effect of the apparent sympathy or prejudice and passion of the trial jury.

PART ONE

A review of the substance of the basic statutes involved and of basic principles of probate law will set a fitting backdrop for the reasons why we believe jurisdiction of the trial court failed when it became apparent the plaintiff had only the capacity of a special administrator.

Section 14-441 A.R.S. (Appendix p. 33) in substance provides for the appointment of a special administrator when:

a. There is delay in granting letters testamentary or of administration from any cause;

b. Letters are granted irregularly;

c. A sufficient bond is not filed;

d. When no application is made for letters;

e. When an executor or administrator dies or is removed;

to take charge *of the estate of the decedent.*

Section 14-442 A.R.S. (Appendix p. 33) provides that the appointment may be made at any time without notice "by entry upon the minutes of the court, *specifying the powers to be exercised by the special administrator.*" (emphasis supplied) The clerk is required to issue letters to such person "in conformity with the order" i.e., specifying the powers granted by the court. The statute requires a bond for the faithful performance of his duties and then provides "he shall take the oath required of administrators."

Section 14-443 A.R.S. (Appendix p. 34) is decisive. It enumerates the duties of the special administrator. He shall:

(a) Collect and preserve for the executor or administrator *the personal property of the decedent*;

(b) Take charge and management of, enter upon and preserve from damage, waste and injury, the real property;

(c) For such purposes he may commence and maintain or defend, actions and proceedings *as an administrator.*

Section 14-444 A.R.S. (Appendix p. 34) terminates the powers of a special administrator when letters testamentary or of administration have issued and provides the executor or administrator may prosecute to final judgment an action commenced by the special administrator.

Section 12-612 A.R.S. (Appendix pp. 32, 33) governs the parties to a wrongful death action. It provides, so far as here material, that the action shall be brought by and in the name of the personal representative of the deceased person. The term "personal representative" is defined to include any person "to whom letters testamentary or of administration are granted by competent authority. * * *"

Turning now to some basic principles of probate law:

2 *Bancrofts Probate Practice,* Section 373, as approved in *Naught vs. Struble,* 139 P. 2d 456, 148 A.L.R. 269, 275, states one of these rules as follows:

" 'The first impression conveyed by such provisions is that the powers of a special administrator may go to any extent with which the court sees fit to invest him. Such, however, is not the rule. *By reason of the nature of the office and specific enumeration of powers,* the distinction between general and special administration must be maintained, and the "other" powers with which the court may invest a special administrator *are only such as are incidental and in the line of the enumerated powers.* He may not be given generally the powers of an executor or administrator, such as the power to allow or pay claims. The powers specifically conferred upon a special ad-

ministrator by the statute are exclusive to such an extent that the court whose officer he is may not require him to go beyond the fair import of the statutory provisions, *and any acts done by him beyond the scope of the authority conferred are void.'* " (Emphasis supplied)

The foregoing case from Idaho shows the general similarity of the statutes of Idaho and Arizona in relation to special administrators. In commenting upon the Idaho statute authorizing such appointment and following our statute almost word for word as to how the appointment is to be made, the court said:

"* * * * Section 15-353, ICA, provides: 'The appointment may be made at any time and without notice, and must be made by entry upon the minutes of the court, specifying the powers to be exercised by the administrator; upon such order being entered, and after the person appointed has given bond, the clerk must issue letters of administration to such person in conformity with the order.'

"It was in conformity with this section that appellant's letters were issued as such special administrator and they recite therein the powers granted him by the probate court as follows: 'To collect and preserve for the administrator all goods, chattels, debts and effects of the decedent, all incomes, rents, issues and profits, claims and demands of the estate, and particularly to arrange for the funeral expenses and expenses of the last illness of said deceased, and generally to exercise such powers of a general administrator as may be provided by law.'

"It cannot be concluded that the probate court in the grant of powers enumerated in the letters, intended to, or did, grant powers to appellant as such special administrator not authorized by our statutes relating to such matters. The powers of a special administrator are limited to such powers as are granted him by statute. (2 Bancrofts Probate Practice, page 705, Section 373.) 'It is the policy of the law to keep the administration of estates within the hands of regularly appointed administrators, and to rely upon special administrators only in cases of emergency and for a limited time. Statutory provisions speaking of powers, duties and liabilities of executors and administrators, are not applicable, as a general rule, to special administrators.' (2 Bancrofts Probate Practice, page 701, Section 371.)"

In *Little vs. Gavin,* 12 So. 2d 549, the Supreme Court of Alabama said:

"The right of the special administrator to maintain the bill is dealt with by statute and decisions. Code 1940, T. 61, § § 89 and 90, read as follows:

" ' § 89. The judge of probate may, in any contest respecting the validity of a will, or for the purpose of collecting the goods of a deceased, or in any other case in which it is necessary, appoint a special administrator, authorizing the collection and preservation by him of the goods of the deceased until letters testamentary or of administration have been duly issued.

" ' § 90. Every such special administrator has authority to collect the goods and chattels of the estate, and debts of the deceased, give receipts for moneys collected, satisfy liens and mortgages paid to him, and to secure and preserve such goods and chattels at such expense as may be deemed reasonable by the probate court; *and for such purposes he may maintain suits as administrator.*' (Emphasis supplied by the court)

"In Ex parte Kelly, 243 Ala. 184, 8 So. 2d 855, 865, it is said: ' * * * that the authority of the probate court, in the appointment of a special administrator, is fixed and limited by statute. It is only that the appointment is for special administrator for the *collection* and *preservation of* the *goods of the deceased,* and not for the purpose of the administration of the estate. (Code 1940, T. 61, § 89).' (Parenthesis supplied.)"

* * * * * *

" 'It is established by this court in Arendale et al. v. Johnson et al., 206 Ala. 245, 89 So. 603, 604, that: "A temporary administrator, or an administrator ad colligendum, as he is usually called, 'is the mere agent, or officer of the court, to collect and preserve the goods of the deceased, until some one is clothed with authority to administer them.' Flora v. Mennice, 12 Ala. 836. In that case it was expressly held that he could be removed at any time. Other than this preliminary duty of collection and preservation, he has nothing to do with the administration of the estate, as contemplated by sections 2519 and 2520 (Code 1940, Tit. 61, § § 80, 81)."

" 'In Mitchell v. Parker, 227 Ala. 676, 151 So. 842, 843, the court said: "Special" administrators must find their author-

ity in the law which governs his situation and in the orders of the probate court. "He is the agent or officer of the probate court. Flora v. Mennice, 12 Ala. 836. His authority as defined by Section 5749, Code (Code 1940, Tit. 61, § 90), is to collect and receive goods, chattels, and debts due the estate, secure and preserve them at such expense as may deemed reasonable by the probate court. He has no authority to pay debts nor receive the presentation of claims. Erwin v. Branch Bank, 14 Ala. 307."

" 'The authority of the special administrator being fixed by statute, the same can neither be restricted nor enlarged by the court appointing him. Underhill v. Mobile Fire Department Ins. Co., 67 Ala. 45, 50. The law fixes the duty of the special administrator after the appointment and not the judge who makes the appointment. Wolffe v. Eberlein, 74 Ala. 99, 107, 49 Am. Rep. 809. * * *"

The Court of Appeals of Texas thus states another rule in *Cobbel vs. Crawford,* 120 S.W. 2d 1085:

"Undoubtedly the petition was fatally defective in failing to allege that the temporary administrator had been authorized or ordered to pay plaintiff's claim. Ordinarily this is the duty of the permanent administrator or the executor, as the case may be. The authority of the temporary administrator is measured by the order of appointment. *His powers are limited and his acts not expressly authorized by the grant of power are void.* Simpkins, Administration of Estates, Sect. 84. *The statutes affecting the powers of a temporary administrator are construed strictly, and he is confined to the powers clearly indicated.* Cruse v. O'Gwin, 48 Tex. Civ. App. 48, 106 S.W. 757; Willis & Bro. v. Pinkard, Tex. Civ. App., 52 S.W. 626." (Emphasis supplied)

Another Court of Appeals of that State in *Lambright vs. Quick,* 214 S.W. 2d 697 states the rule:

"It is the established law in this State that a temporary administrator has only such limited powers as are conferred upon his by the order of the court appointing him, *and that the mere allegation that appellee was the temporary administrator of the Lynn estate does not state any authority on his part to approve appellant's claim for services rendered the estate* and the

trial court did not, we think, abuse its discretion in entering its order dismissing the suit for lack of jurisdiction. Fenimore v. Youngs et al., 119 Tex. Com. App. 159, 26 S.W. 2d 195; Cobbel v. Crawford et al., Tex. Civ. App., 120 S.W. 2d 1085; Tolivar v. Lombardo, Tex. Civ. App., 88 S.W. 2d 733." (Emphasis supplied)

In a leading case from that jurisdiction as to the general right of a special administrator to engage in litigation, *Willis vs. Pinkard*, 52 S.W. 626, the court said:

" * * * excellent reasons exist why the powers of a temporary administrator should not be extended beyond those clearly intended to be conferred by the court appointing him. The appointment may be made upon the court's own motion, without notice, and before the estate, and the condition of it, has been otherwise brought within the cognizance of the probate judge. No party at interest has the opportunity to protest, whatever objection might be urged to the character or capacity of the individual appointed. * * * * * The contention that the language of the order conferring the powers in this instance necessarily include the power to sue for possession, we do not consider tenable. The words 'take charge of and care for' cannot be held to confer the power to involve the estate in litigation, and liability for costs and attorney's fees. Nothing short of the emergency contemplated by the statute would authorize the court to appoint a temporary administrator in any case, and it cannot be successfully contended that the powers of a temporary administrator should be dangerously extended in the absence of all emergency. * * * * "

In *Fenimore vs. Youngs,* 26 S.W. 2d 195, an opinion by the Commission of Appeals adopted by the Texas Supreme Court, the court said:

"Article 3373, R.C.S. of Texas, 1925, authorizes the appointment of a temporary administrator with such limited powers as the circumstances of the case may require. Article 3374 provides that the order of appointment shall define the powers conferred. Clearly, under these two articles, *a temporary administrator only has such limited powers as the court appointing him may by order define, and the mere allegation that Fenimore is the temporary administrator of the estate of Ross*

Youngs, deceased, does not state any authority on his part to bring the suit, and the district court did not abuse his discretion in refusing a default judgment on such a petition. Willis v. Pinkard, 21 Tex. Civ. App. 423, 52 S.W. 626." (Emphasis supplied)

That a special administrator must affirmatively set up his authority appears clearly from *Tolivar vs. Lombardo,* 88 S.W. 2d 733:

"First, appellee's petition alleged that F. F. Tolivar was 'the duly qualified and acting temporary administrator, of the estate of C. R. Tolivar deceased'; there was no allegation of the extent of the powers conferred upon him by the court in his appointment as such temporary administrator. There was no allegation that, by his appointment, he was authorized to approve or reject the claim sued upon, or to defend this suit. These were special powers to be exercised by him only on the orders of the probate court. Without a specific grant of power, he had no authority to bind the estate by approving or rejecting these claims, nor could he defend this suit for the estate as temporary administrator. A temporary administrator has only such powers and duties as are conferred upon him by the order of appointment. No inference could be drawn from the allegations of appellee's petition that appellant, as temporary administrator, had authority to approve or reject these claims, or to defend this suit. The petition was bad on general demurrer and insufficient to support the judgment. Article 3373, Vernon's Ann. Civ. St.; article 3378, Vernon's Ann. Civ. St.; article 3379, Vernon's Ann. Civ. St.; Allar Co. v. Roeser (Tex. Civ. App.) 217 S.W. 442; Youngs v. Youngs (Tex. Com. App.) 26 S.W. (2d) 191; Fenimore v. Youngs, 119 Tex. 159, 26 S.W. (2d) 195; Laas v. Seidel, 95 Tex. 442, 443, 67 S.W. 1015."

The Supreme Court of Montana thus announced the rule in *In re Williams Estate,* 173 Pac. 790:

"It is idle to cite sections of the Code or decided cases which have to do with the duties and liabilities of a guardian, an executor, or a general administrator, for they have no application to a special administrator, whose duties, powers, and responsibilities are defined by sections 7470-7476, Revised Codes. His office is one specially created by statute with limited tenure

and limited powers. To determine whether a particular duty is imposed upon him, he has but to consult these seven sections of the Code, and, if the duty is imposed, it is there disclosed. If the statute is silent, it is so because the Legislature has withheld the duty. These sections have been construed to limit the functions of a special administrator to the exercise of such powers only as are 'necessary to collect and preserve the estate for the executor or administrator to be regularly appointed.' State ex rel. Bartlett v. District Court, 18 Mont. 481, 46 Pac. 261; Ford's Estate, 29 Mont. 283, 74 Pac. 736. The reason for the rule must be apparent to any one. The special administrator holds temporarily and may be called upon to relinquish his control any day. His authority ceases automatically upon the appointment and qualification of the executor or general administrator. Section 7475, Rev. Codes. To such an extent are the provisions of sections 7470-7476 exclusive, *that the court whose officer the special administrator is cannot require him to go beyond the fair import of their terms, and any acts done by him beyond the scope of the authority conferred are void.* State ex rel. Bartlett v. District Court, above." (Emphasis supplied)

We do not believe further citation of authority is required to demonstrate:

(a) A special administrator has no inherent authority; the statute as implemented by the court's order specifying his authority is the extent and measure of his authority and acts beyond his specified authority are void;

(b) Mere proof that one has been appointed a special administrator raises no presumption that the order of appointment grants him the power to do anything — certainly raises no presumption that the order of appointment goes beyond the statute specifying the duties and powers which may be granted a special administrator.

We respectfully represent to the Court that the express provisions of Arizona law stating what suits a special administrator may bring excludes all others and therefore clearly excludes a wrongful death action. Such an action is not an asset of the estate. Section 12-611 A.R.S. et seq. *Cochran vs. Meacham,* 159 P. 2d 302

(Ariz.); *Friedman vs. McHugh,* 168 F. 2d 350. It does not constitute "personal property of the decedent."

If it be argued that a special administrator is a "personal representative" within the meaning of Section 12-612 there are two answers.

First, it is apparent that the language of Section 12-612 intends a personal representative in the true sense of the word. The phrase "letters testamentary or of administration" indicate nothing else. A special administrator is an agency of the court, a conservator.

In re Hayer's Estate, 11 N.W. 2d 592, 233 Ia. 1343.
State ex rel McCabe vs. District Court, 76 P. 2d 634, 106 Mont. 272.

Secondly, by express terms of our statutes the court, in appointing the special administrator must, if the court desires to extend to the special administrator the authority to bring such an action (if we give the phrase the broadest meaning), by order authorize such action upon his part. The rule is firmly established in Arizona that statutes relating to the same subject matter are to be construed together and full effect given to each, if possible.

National Surety Co. vs. Conway, 33 P. 2d 276, 43 Ariz. 480;
Rowland vs. McBride, 281 Pac. 207, 35 Ariz. 511;

Home Owners' Loan Corp. vs. City of Phoenix, 77 P. 2d 818, 51 Ariz. 455;

Industrial Commission vs. School Dist. No. 48, 108 P. 2d 1004, 56 Ariz. 476.

The phrase "personal representative" was added to the provisions of the wrongful death statute in connection with the 1913 revision of the Arizona statutes. At that time the provisions of what is now Article 3, Title 14 "Special Administrators" had been a part of our statutes since the 1901 revision. It was carried forward and made a part of the 1913 revision unchanged and containing the requirement that the court, in appointing a special administrator must specify his powers. The conclusion, therefore, is inescapable if we are to reason logically that the

legislature intended (if it intended a special administrator might bring such an action) that such special administrator should be one appointed in accordance with the language it had written in the same revision, that is, with this power granted by the court if the court deemed it wise to permit such a special, temporary agent to so act.

> "On the presumption that whenever the legislature enacts a provision it has in mind the previous statutes relating to the same subject matter, it is held that in the absence of any express repeal or amendment therein, the new provision was enacted in accord with the legislative policy embodied in those prior statutes and all should be construed together * * *"
>
> *Frazier vs. Terrill,* 175 P. 2d 438, 65 Ariz. 131 (quoting from Section 5201, Sutherland's Statutory Construction)

A further principle of statutory construction steps in to remove any question but that the order appointing the special administrator must grant this express authority, if it is to be exercised by the special administrator. It is universally held that where there is a special statute specifically spelling out controls for a given situation, the special statute governs over the general:

> "It is the general rule of construction that where there is a general statute dealing with a subject in comprehensive terms and another dealing with a part of the same subject in a more minute and definite manner, the two should be read together and harmonized if possible, so as to give full effect to the legislative intent. Gideon v. St. Charles, 16 Ariz. 435, 146 P. 925; Arizona Eastern R. Co. v. Matthews, 20 Ariz. 282, 180 P. 159, 7 A.L.R. 1149; 59 C.J. 1056. * * * *"

In *United States vs. Jefferson Electric Mfg. Co.,* 291 U.S. 386, 78 L. ed. 860, 54 S. Ct. 443 the United States Supreme Court laid down this rule:

> "As a general rule where the legislation dealing with a particular subject consists of a system of related general provisions indicative of a settled policy, new enactments of a fragmentary nature on that subject are to be taken as intended to fit into the existing system and to be carried into effect conformably to it, excepting as a different purpose is plainly shown."

See also *U. S. vs. State of Arizona,* 295 U.S. 174, 79 L. ed. 1371, 55 S. Ct. 666

We respectfully submit that whatever construction be given our statutes, escape cannot be had from the conclusion that Wanek had no authority to bring these actions. If he had no standing to bring the actions there was no diversity or other jurisdiction in the District Court — hence there was nothing for Crehore to be substituted to.

PART TWO

This relates to the failure of the plaintiff to offer any actuarial evidence as to the measure of damages and the resulting highly excessive verdict — a verdict which plainly reflects lack of understanding, and passion, prejudice or sympathy.

It is, of course, firmly settled in Arizona that the measure of damages in a case such as this is the present value of the probable accumulations of the deceased.

Jones vs. Weaver, 123 F. 2d 403 (Ninth Circuit)

Arizona Binghamton Copper Co. vs. Dickson, 195 Pac. 538, 22 Ariz. 163, 178

Western Truck Lines vs. Berry, 78 P. 2d 997, 52 Ariz. 38, 48

So. Pac. Ry. Co. vs. Gastelum, 297 Pac. 875, 38 Ariz. 127

Plaintiff requested an instruction to that effect (T.R. 26) and the court instructed the jury without objection by plaintiff that such was the rule. The court told the jury (T.R. 433 et seq.) that they were to consider the health, earning capacity, character of the deceased, and arrive at a sum equal to the present value of the probable accumulations of the deceased, defined present value as the worth now of money payable in the future determined or calculated on the basis of the highest rate of interest that can be had on money safely invested. He ruled out living expenses of the family and loss of support and maintenance of the children was also removed from the jury's consideration.

In other words, the court told the jury to calculate what the decedents would have saved and had to pass on to their estates

and then reduce that to an amount which if invested now at the highest rate money can be safely invested, would grow to the amount of the probable accumulations of the decedents.

And the jury concluded they would save and have on hand at their death close to $150,000! This in the face of the fact a medical doctor testified he rejected Sanders for employment at White Sands because of a suspicision of tuberculosis — "it appeared to be tuberculosis and that he should seek medical care"; (T.R. 308) the decedent Delphia F. Sanders had no trade or profession and her only earning history was as earning on some occasions $10 to $11 weekly as a baby sitter (T.R. 292) Sanders himself was then unemployed (T.R. 277, 278) and had been working at odd jobs since October, 1953, (T.R. 278) and the total accumulations to the date of the accident were in the neighborhood of $4,000. (T.R. 288)

It is true the daughter testified the chest condition according to family knowledge arose from a bad case of pneumonia when Sanders was young which left some scars on his lungs and that he had loaded the family and all of their possessions in the car and trailer for the sole purpose of returning to California to get his civil service records from Hunters Point Shipyard to prove this. (T.R. 280, 281) The likelihood of a man hauling his entire family and all his wordly goods back to California for the sole purpose of turning around and hauling them back is remote.

In addition, significantly, Sanders slept outside in the automobile the entire time the family was at Las Cruces despite the fact the landlady offered to put an additional bed in the two-room motel. (T.R. 327)

His past earning history was unimpressive. Coming to California in 1942 (T.R. 276) he first did construction and road work, worked as a millwright and in the naval shipyard at Hunters Point. His earnings there — his last regular employment, which ended in October 1953, were "about close to $400 per month, I think." (T.R. 277, 278)

If we accept this guess as authentic, concede he would work at this rate of pay each year of his remaining life expectancy, live out his full life expectancy, spend nothing for food, clothing or any other purpose, pay no income taxes, lose no time in sickness and save every penny he earned, we still fall about $40,000 short of the earnings the jury credited to his earning power, calculated on a 3% simple interest basis. If we assume he saved half of those earnings — which manifestly would be impossible — we still fall $10,000 short of the $65,000 the jury allowed him, which leaves us without any basis for any award to Mrs. Sanders' estate at all.

We are not here to defend the Arizona measure of damages — we are here to say that under the Arizona law the verdicts are absurd — so manifestly the result of sympathy that to permit them to stand would amount to taking these defendants' property, not through the instrumentality of a court of justice but in defiance of law — using the procedures of our courts to take money out of one person's pocket and put it into that of another who has no right in law or justice to have it.

The accident happened at three o'clock in the morning. There were the usual gouges and marks on the pavement, all of which concededly were on the north side of the highway, which would have been the wrong side of the highway for defendants. After the collision (T.R. 216) defendants' truck went about two hundred feet generally northeasterly across the highway and ended completely off the highway facing generally northeasterly. There were tire marks from a point a few feet north of the center line apparently leading to the rear duals of defendants' trailer. The course of defendants' truck and trailer, if reflected by the tire marks, was straight, that is, it did not swerve until it came to a rest. The Hudson ended up facing generally south on the north half of the highway about half on and half off the north shoulder of the highway. (T.R. 163) The left front fender was torn off the Hudson and was found underneath defendants' truck where stopped. (T.R. 173, 174) The left front wheel of the Hudson

was crushed. (~~Deft's~~ PLF'S Exhibit 5 in Evid.) The front wheels of the Mack tractor of defendants were torn loose from the tractor and rode the under carriage back to the driving wheels of the tractor where they were found when the vehicle came to rest. (T.R. 177, 178, 356) The front of the tractor was uninjured except that the left front bumper was bent sharply inward. The left side of the tractor from the front bumper back to the drivers was raked clean, left fender, running board and battery case were all torn off. (~~Deft's~~ PLF'S Exhibit 6, 26 in Evid.) Looking at the truck from the front, however, showed no evidence of impact other than the left end of the front bumper, about two feet in length, was bent almost at right angles and the end rested against the frame of the truck. A radiator guard plate about a foot above the bumper of fairly light steel showed no evidence of impact. (Deft's Exhibit B in Evid.)

The entire left front corner of the Hudson was a shambles — crushed back into the front seat. (~~Deft's~~ PLF'S Exhibit 5, 9 in Evid.)

Against this physical evidence plaintiff countered with general statements by persons who were at the accident scene that night when all was confusion or the next morning long after the wreck (T.R. 108 et seq.; 158 et seq.; 184 et seq.;) generally to the effect that these were the marks beginning north of the center line near certain gouges or marks and leading to the rear of defendants' truck. Admittedly none of the witnesses made a detailed or careful examination, admittedly the pavement was washed off by a pressure washer using either about forty pounds of pressure or seventy pounds (T.R. 187, 188, 209, 210, 211) which contained a salt solution known as "wet water."

Ripka testified that the impact broke the air line which would have the effect of setting up the brakes on the trailer automatically which would occur within a few seconds after the break. (T.R. 264)

While we do not expect this court to re-try the issue of liability, we do say that the principal facts are such that, of necessity, it had to be the Sanders' car which crossed over the center line. If

the heavy Mack truck and trailer had been turned into the Hudson at the moment of impact, as squarely as the left front corner of the Hudson was engaged it would have simply rolled on over the top of the car and rolled it up before the Mack. The entire left front corner of the Hudson was involved. If it was on its own side and in proper position on its side, for the Mack to have engaged the Hudson sufficiently to cause that type of damage the Mack would of necessity had to be cutting sharply across the center line. Had this been the case upon its left front engaging the Hudson it would as a physical result have turned across the highway and overturned. In addition, for the Mack to have been the turning vehicle and to have done the damage to the Hudson shown by the pictures, the left front corner of the Mack would have to have been involved — yet it was uninjured.

The fact there are tire marks from the scene of the accident mean little. When the Hudson caught the left front wheel of the Mack of necessity the truck was turned north and across the center line. Ripka was temporarily stunned and he did not put the trailer brakes on; (T.R. 271) this was the result of automatic action which would result in the brakes coming on as the trailer reached the accident scene.

Three hard facts, above argued, demonstrate the jury was out of hand as to liability as well as damages:

1. Had the truck been turning sufficiently to engage the Hudson across its entire front end, it would have turned across the highway and overturned;

2. Had the truck been turned sufficiently to engage the left front corner of the Hudson and by *its force forward* done the damage to the Hudson shown, it would have rolled the Hudson before it; it would have flattened it like a road roller flattens a tin can;

3. Had the truck been sufficiently turned across the highway that it was running into the Hudson to have done the damage by force forward of the truck the left front corner of the truck would have been involved. This the pictures show did not occur.

(Deft's Exhibit ..... in Evid.) The bent bumper on the left front of the Mack, the crushed left front wheel of the Hudson, the torn loose front wheels of the truck all combine to point unerringly to the truth; all corroborate Ripka's testimony that the Hudson cut into the truck just catching it on its left front wheel.

We are not unaware of the burden we assume in asking this Court to review the action of the trial court on the question of excessive damages.

The decision of this Court in *Southern Pacific Co. vs. Guthrie,* 180 F. 2d 295, id. 186 F. 2d 928, lays upon us a burden which is heavy, although we do not interpret the use of the word "monstrous" in the second opinion as adopting that as a test for review. We firmly believe that where upon the record as made there is no evidence from which a reasonable man can conclude the damages awarded were justified, a litigant is entitled to relief. We believe the modern view in the federal appellate courts is moving in that direction.

Bucher vs. Kraus, 200 F. 2d 576 (Seventh Circuit)

> "And quite apart from the error in the charge, we think the trial judge erred in refusing to set aside the verdict as excessive and grant a new trial. Ordinarily, of course, the amount of damages is for the jury, and whether a verdict should be set aside as excessive is a matter resting in the discretion of the trial judge. This, however, is not an arbitrary but a sound discretion, to be exercised in the light of the record in the case and within the limits prescribed by reason and experience; and where a verdict is so excessive that it cannot be justified by anything in the record or of which the court can take judicial notice, it is the duty of the judge to set it aside. Failure to do so is an abuse of discretion, analogous to error of law, and as such reviewable on appeal."

Virginian Ry. Co. vs. Armentrout, 166 F. 2d 400 (Fourth Circuit)

Brabham vs. State of Mississippi, 96 F. 2d. 210 (Fifth Circuit)

In *Ford Motor Co. vs. Mahone,* 205 F. 2d 267, (Fourth Circuit) the court held that the size of the verdict, which had no

support in the evidence, and the pitiful condition of the plaintiff warranted a finding that sympathy was the cause of the excessive verdict, and reversed the order of the trial judge denying a new trial on the ground of excessive damages.

See also *Trowbridge vs. Abrasive Co.,* 190 F. 2d 825 (Third Circuit)

We believe, further, that a valid distinction exists between a personal injury case where the intangible values of pain and suffering, embarrassment, and discomfort, are involved, and a wrongful death case where a jury has little speculative leeway in awarding damages, for there are involved no intangible values to be appraised by the jury and trial judge and which bring heavily into play judgment and discretion.

Either we should simply tell the jury to bring in such verdict as they think right or we should require that they relate their finding to some evidence which at least tends to support their conclusion.

We recognize the powerful and overriding impulse to help which could not but arise upon seeing three orphaned girls in the court room. Certainly it is a tragic thing. We say the rank tragedy of the occurrence blinded the trial jury to where it refused to weigh liability dispassionately and caused it to reject the court's instructions on the measure of damages entirely.

For a jury to find that Mrs. Sanders, with no history of any training or earning power other than as a baby sitter, would earn and save, after taxes, living expenses, etc. $35,362 (at 3% simple interest) during her life expectancy of about twenty-nine years makes a mockery of the court's instructions. *The jury simply had to ignore what the court solemnly told it as to the law.* Do we not compound this open disregard for a judicial determination of a litigant's property rights if the action of the trial judge in refusing to apply his own words as to what the law is in passing upon our motion for a new trial is affirmed?

Perhaps to lawyers and judges not familiar with our measure of damages the verdicts do not appear shocking and completely

beyond the law; perhaps in Idaho or California they would be accepted as high but not shocking. Such is not Arizona law and it was Arizona law which the jury was required to accept and be guided by in its deliberations.

We respectfully represent to the Court that justice dictates that a new trial be ordered upon this issue.

CONCLUSION

1. The judgment should be vacated and the causes dismissed for failure of proof of diversity of citizenship.

2. The judgments should be vacated and the causes dismissed for the reason Wanek, as special administrator had no authority under the Arizona statutes to bring or prosecute the actions. If it be concluded a special administrator as such is a "personal representative" before he can become such lawfully he must be appointed pursuant to the Arizona law, which limits his authority to the powers granted in the order of appointment.

3. In any event, a new trial should be ordered by reason of the grossly excessive damages, the fruit of the sympathy of the jury for the three orphaned daughters of the deceased Sanders.

Respectfully submitted,
SNELL & WILMER
By Mark Wilmer

APPENDIX

ARIZONA REVISED STATUTES

ARTICLE 2. DEATH BY WRONGFUL ACT

§ 12-612. Parties plaintiff; recovery, distribution; failure to bring action

A. An action for wrongful death shall be brought by and in the name of the personal representative of the deceased person.

B. The father, or in the case of his death or desertion of his family, the mother, may maintain the action for death of a child, and the guardian for death of his ward.

C. The amount recovered in an action for wrongful death shall be distributed to the parties and in the proportions provided by law for distribution of personal estate left by persons dying intestate.

D. The term "personal representative" as used in this section shall include any person to whom letters testamentary or of administration are granted by competent authority under the laws of this or any other state. The action for wrongful death may be maintained by any such personal representative without issuance of further letters, or other requirement or authorization of law.

E. If the deceased left no estate or assets within this state other than the cause of action for wrongful death, the action may be brought by the surviving husband or wife in his or her own name and on behalf of the estate in all cases where no letters testamentary or of administration have been issued in this state, or when the personal representative of the deceased has failed for ninety days after the cause of action accrued under the provisions of this article to bring the action.

ARTICLE 3. SPECIAL ADMINISTRATORS

§ 14-441. Circumstances under which special administrator appointed.

When there is delay in granting letters testamentary or of administration from any cause, or when the letters are granted irregularly, or a sufficient bond is not filed as required, or when no application is made for letters, or when an administrator or executor dies or is suspended or removed, the court shall appoint a special administrator to collect and take charge of the estate of the decedent in whatever county or counties the estate may be found, and to exercise such other powers necessary for preservation of the estate.

§ 14-442. Appointment of special administrator; bond

A. The appointment of a special administrator may be made at any time, and without notice, and shall be made by entry upon

the minutes of the court, specifying the powers to be exercised by the special administrator. Upon the order being entered, the clerk shall issue letters of administration to such person in conformity with the order. In making the appointment the court shall give preference to the person entitled to letters testamentary or of administration. No appeal may be taken from the order of appointment.

B. Before the letters issue, the special administrator shall give bond in such sum as the court directs with sureties to be approved by the judge, conditioned upon the faithful performance of his duties, and he shall take the oath required of administrators which shall be endorsed on the letters.

§ 14-443. Duties of special administrator

A. The special administrator shall collect and preserve for the executor or administrator the personal property of decedent, take charge and management of, enter upon and preserve from damage, waste and injury, the real property, and for such purposes may commence and maintain, or defend, actions and proceedings as an administrator.

B. The special administrator may sell any perishable property the court may order sold, and exercise such other powers as are conferred upon him by his appointment, but he is not liable in an action by a creditor on a claim against decedent.

§ 14-444. Termination of power of special administrator; delivery of property; accounting

A. When letters testamentary or of administration on the estate of the decedent have been granted, the powers of the special administrator cease, and he shall forthwith deliver to the executor or administrator all property and effects of the decedent in his custody, and render an account and report of his proceedings in like manner as administrators.

B. The executor or administrator may prosecute to final judgment an action commenced by the special administrator.